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No. 74-826

In the Supreme Court of the United States

CHARLES BERGSTRALH,

Petitioner,

v.

GAYLE LOWE and CITY OF BEND, OREGON,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

The District Court judgment was based upon a jury verdict. The opinion of the Court of Appeals for the Ninth Circuit, the concurring opinion and the dissenting opinion (App. D of Petition) are not found in the Federal Reports.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

Whether there was probable cause for petitioner's arrest.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

"§ 1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

This litigation concerns the legality of petitioner's arrest by respondent Lowe, a police officer employed by the City of Bend. The city is no longer a party to the case.

Petitioner's witnesses testified that he was loud, abusive and threatened them with bodily harm (R. II, p. 43, R. III, p. 175). Respondent Lowe, a city policeman, was, at one point, required to step in to prevent petitioner from attacking one of the witnesses (R. II, p. 46). Petitioner would not calm down and eventually, according to all the witnesses except pe-

titioner, threw empty beer bottles into the adjoining four-lane highway (R. II, pp. 47, 73, 74, 75, 95).

Petitioner was placed under arrest but refused to go with respondent Lowe (R. III, pp. 189, 190). Eventually petitioner dragged respondent Lowe into the parking lot and took him down to the ground (R. III, pp. 218-220). With help, petitioner was handcuffed and taken to jail (R. I, p. 61; R. II, p. 98).

Tried on two charges by a jury in Municipal Court, petitioner was acquitted of disorderly conduct but convicted of resisting arrest (R. III, p. 194). Due to a clerical error, the conviction was recorded as an acquittal and when the case was appealed by petitioner to a higher state trial court, the charge was dismissed on petitioner's motion based upon former jeopardy.

This case was filed in Federal District Court alleging that petitioner's civil rights were violated as proscribed by 42 U.S.C. 1983. The contentions involved false arrest and assault and battery. The Federal District Judge ruled that there was probable cause for the arrest but submitted the assault and battery contentions to the jury which resolved those issues in favor of respondent.

ARGUMENT

The issue in the present case is too narrow to warrant review by this Court on certiorari. The sole question properly presented here is whether the District

Court, on the particular and somewhat peculiar facts of this case, properly withdrew the issue of false arrest from the jury. The Ninth Circuit Court of Appeals found the District Court's ruling to be correct on two grounds.

The District Court was overly patient with petitioner in allowing him to present any and all evidence he could in support of his contentions.

Petitioner's main complaint seems to be directed toward alleged improprieties in the proceedings against him tried in the Municipal Court of the City of Bend. Those issues are not properly in this case as they were resolved in the Circuit Court for the State of Oregon. Petitioner's apparent concern that he was denied the opportunity to be exonerated of criminal charges by a jury is misplaced in view of the fact that he was the beneficiary of a ruling, on his motion, which resulted in those charges being dismissed.

On the individual facts of this case the rulings of the District Court were manifestly correct. There is no real conflict in decision and no important question of Federal law requiring decision by this Court. This is merely a case where, as stated in the concurring opinion, petitioner not only failed in his burden of proof but his evidence also established the existence of probable cause for the arrest which therefore required the withdrawal of that issue from the jury.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

MORRISON, DUNN, COHEN, MILLER & CARNEY

By /s/ Thomas H. Tongue
THOMAS H. TONGUE
Of Attorneys for Respondent

January 15, 1975

I hereby certify that I served the foregoing Respondent's Brief on Charles Bergstralh, petitioner, on the .....day of January, 1975, by mailing to said petitioner three correct copies thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said petitioner at his address, to-wit: Box 961, Bend, Oregon 97701, and deposited in the post office at Portland, Oregon, on said day. Between the said post office and the address to which said copy was mailed, there is a regular communication by U. S. Mail.

DATED this .....day of January, 1975.

MORRISON, DUNN, COHEN, MILLER
& CARNEY

By .....
THOMAS H. TONGUE
Of Attorneys for Respondent